

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-7586

ORIGINAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

RED STAR TOWING AND TRANSPORTATION
COMPANY,

Plaintiff-Appellant,

against

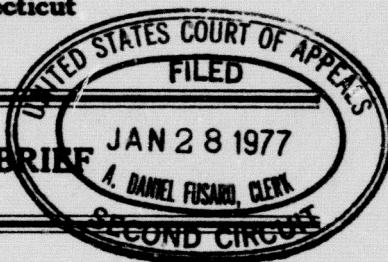
P/S

STATE OF CONNECTICUT and SAMUEL KANELL,
Commissioner of Transportation of the State of
Connecticut,

Defendants-Appellees.

Appeal from the United States District Court for the
District of Connecticut

APPELLANT'S BRIEF



McHUGH, HECKMAN, SMITH & LEONARD

Attorneys for Appellant

80 Pine Street

New York, New York 10005

(212) 422-0222

RICHARD E. MEYER

Of Counsel

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FOR THE SECOND CIRCUIT

RED STAR TOWING AND TRANSPORTATION
COMPANY,

Plaintiff-Appellant,

against

STATE OF CONNECTICUT and SAMUEL KANELL,
Commissioner of Transportation of the State of
Connecticut,

Defendants-Appellees.

On Appeal from the United States District Court for the
District of Connecticut

APPELLANT'S BRIEF

This is an appeal from a decision by Judge Robert C. Zampano granting defendants' motion to dismiss the complaint on the grounds that plaintiff was precluded by the Eleventh Amendment from suing defendants in the United States District Court. The opinion has not been reported.

Statement of the Case

Appellant is the owner and operator of the tug OCEAN KING. Defendant, State of Connecticut, through its De-

partment of Transportation, is the owner and operator of the Tomlinson Bridge which carries U.S. Highway Route 1 traffic over the Quinnipiac River in New Haven Connecticut Harbor. It is a bascule type bridge having a vertical clearance in closed position of 12 feet (See chart 12371 of the National Oceanic and Atmospheric Administration, National Ocean Survey) so that it is required to be opened to permit the passage of virtually all, if not all, commercial vessels. The operation of said bridge with respect to opening for the passage of vessels is governed by Federal regulations.*

In its complaint, invoking the admiralty and maritime jurisdiction of this court, Appellant alleges that its tug OCEAN KING sustained damages as a result of a collision with an abutment of the Tomlinson Bridge on September 23, 1974. Appellant further alleges that the collision was caused solely by the negligence of the bridge operator, an employee of the State of Connecticut, in failing to open the bridge in response to proper signal from the tug OCEAN KING in violation of Federal regulations.

In its answer, which was a general denial, Appellee also interposed four affirmative defenses and thereafter moved to dismiss the complaint on the ground that the doctrine of sovereign immunity deprived the court below of jurisdiction over the defendants. After the submission of memoranda in support of the motion to dismiss, in opposition, and in reply, Judge Zampano issued an opinion granting defendants' motion.

The issue involved here, i.e. whether the State of Connecticut has impliedly waived its sovereign immunity through its construction and maintenance of an interstate bridge, has been the subject of a number of decisions in

* 33 C.F.R. 117.120

other circuits but does not seem to have been decided in this circuit. These cases, and the arguments accompanying them, were set forth in the memoranda submitted below which memoranda are included in the Joint Appendix. These cases were also discussed by Judge Zampano in his ruling and do not require reiteration in this brief. Instead reference is made to all memoranda submitted below for the full scope of the cases and the issues discussed and decided.

I

The court below failed to give adequate consideration to the role of bridges in interstate commerce.

Judge Zampano found that the principle enunciated in *Parden v. Terminal R. Co.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964) and *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 79 S. Ct. 785, L. Ed. 2d 804 (1959), that "when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were private person or corporation", *Parden v. Terminal R. Co.* supra at p. 196, was not as compelling as other courts have found. While it is true that *Petty* may be minutely distinguished because it appears that the Supreme Court relied on congressional approval of a compact which included a preservation of Federal Court jurisdiction in admiralty matters involving interstate commerce and also *Parden*, which involved specific statutory language under the FELA which the Supreme Court held extended to all interstate railroad carriers, even those operated by a state, at least the Fourth Circuit was not so persuaded, see *Cheasapeake Bay Bridge v. Lauritzen*, 404 Fed. 2d 1001 (4th Cir. 1968).

In the decision below the Court set forth three requirements that must be met before a State may be held to have waived its protection under the Eleventh Amendment citing *Williamson Towing Co., Inc. v. State of Illinois*, 396 F. Supp. 431, 436 (E.D. Ill. 1975). These requirements were (1) State participation in the area subject to Federal legislation; (2) the existence of a private civil cause of action within the applicable legislation; and (3) evidence that Congress intended to include States within the class of defendants subject to liability under the legislation in question. As to the first requirement the *Williamson* case at page 436 readily concedes that a State has entered into the Federal sphere of interstate commerce by its operation and maintenance of a highway bridge.

The second requirement is the existence of a private civil cause of action within the applicable legislation, a matter rather lightly treated by *Williamson*. This question was extensively discussed by Judge Newman of the District of Connecticut Court in the case of *Parsell v. Shell Oil Co.* which has just appeared in the advance sheets at 421 F. Supp. 1275 (D. Conn. 1976). The issue under consideration there was whether plaintiff had an implied private right of action under that section of the Rivers and Harbors Appropriation Act which makes it unlawful to discharge oil into navigable waters. Judge Newman relied on a number of cases from this circuit beginning with *Reitmeister v. Reitmeister*, 162 Fed. 2d 691 (2nd Cir. 1947), that sets forth a general doctrine "which in the absence of contrary implications, construes a criminal statute, enacted for the protection a specified class, as creating a civil right in the members of the class, although the only expressed sanctions are criminal".

The proper standard for judging a particular statute were established by the Supreme Court in *Cort v. Ash*,

422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d (1975), *Parsell v. Shell Oil Company* at p. 1278. The first standard is that plaintiff be one of the class for whose special benefits the statute was enacted. Clearly the existing statutory scheme with respect to the operation of bridges over navigable waters is to insure that said bridges do not obstruct navigable waters and that they provide free movement for navigation the right to which is paramount. The Federal regulations which govern the Tomlinson Bridge were designed, by their very reading, to accommodate bridge highway traffic to that of water traffic. The regulations were clearly designed to benefit all commercial vessels including that of plaintiff in its daily rounds in interstate commerce.

The second standard is that there be an indication of legislative intent, express or implicit, either to create such a remedy or to deny one. Precisely such intent has been found in many cases starting with *Lauritzen*, *supra*. In addition there is no question that if private parties were involved here rather than the state of Connecticut, a breach of the Federal Regulations governing the operation of the bridge would set the standard of care for the civil liability of the private bridge operator, eg. *Erie Lackawanna Railway Co. v. Timpany*, 495 Fed. 2d 830 (2nd Cir. 1974). Therefore the remedy has for some time existed as to private parties therefore establishing an implicit legislative intent to create such a remedy.

The third factor requires consistency with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff. That determination has already been made by various courts in recognizing that a cause of action rests in private hands under the various sections of the Rivers and Harbors Appropriation Act including oil pollution where obstruction to navigation is alleged, *Parsell v. Shell Oil Co.* *supra*.

The final standard questions whether the cause of action is one traditionally regulated to state law in an area basically the concern of the State, so that it would be inappropriate to infer a cause of action based solely on Federal law. Nothing could be further removed from the State Law than the substantive admiralty and maritime law of the United States which takes precedence over State law with respect to admiralty and maritime matters. Clearly the cause of action would be based solely on Federal law and be concerned with an area of law which is not and has never been the concern of the various states.

It is respectfully submitted that the ownership and operation of the Tomlinson Bridge by the State of Connecticut is as much a proprietary function outside the sphere of governmental activity shielded by the Eleventh Amendment as was the State of Alabama's operation of an interstate railroad in the *Parden case*, supra. The number of bridges over navigable waters must be staggering. Although no figures are available to Appellant, the ownership of such bridges in private persons such as railroads must be substantial. There are of course many bridges owned by a governmental authority starting with a State and proceeding into lower municipalities, e.g. *Raymond International, Inc. v. M/T Dalzeleagle*, 336 F. Supp. 679 (S.D.N.Y. 1971). Any such municipality, other than a State, does not enjoy immunity and is subject to the admiralty jurisdiction of the Federal Court, *Workman v. The City of New York*, 179 U.S. 552, 21 S. Ct. 212, 45 L. Ed. 314 (1900). Every such private or municipal owner other than a State is of course not only subject to the admiralty jurisdiction of the Federal Court but would be liable for all maritime torts arising out of the operation of said bridge including all violations of the Federal regulations pertaining to said bridge (see cases cited by Judge Zampano at p. 5 of his ruling).

The State's ownership and operation of a bridge is not a unique function restricted solely to the sphere of State activity. It is a function and proprietary activity shared by private parties through out the States and the Supreme Court, many years ago, concluded that it would not make one rule for negligence in a maritime tort where a municipality is the employer and another rule where a private person is the employer, *Workman v. The City of New York*, supra.

The third criterion required by Judge Zampano in his ruling is that there be evidence that Congress intended to include States within the class of defendants subject to liability under the legislation in question. It is clear that all private parties and all governmental units other than a State are subject to liability if found at fault in the operation of a bridge, the standard of care of which is frequently measured by the Federal regulations pertaining to said bridge. It is respectfully submitted that there are no alternative means of relief existing for parties which suffer damages as a result of negligence in the operation of a State of Connecticut owned bridge.

Appellee has of course suggested below that there are other avenues of relief either by administrative procedures or state court action (see p. 1 of Judge Zampano's ruling). However obtaining the consent of the Commission on Claims to bring an action against the State carries with it a one year Statute of Limitations, whereas the admiralty period of limitations is governed by laches. The second method concerns personal injuries or property damages sustained on defective highway bridges or sidewalks in the State Highway system. A reading of those statutes indicates that the defective bridges referred to therein concern highway defects or injuries sustained as a result of vehicular or pedestrian use of bridges and not to navigational uses. There is also a ninety day notice

requirement under that section. In addition, the criteria used by the Commission on Claims is not known, however it would be fair to say that it would probably not rely on the substantive maritime law of the United States with which it would have no concern.

Clearly States must be included in the class of defendants subject to liability in the ownership and operation of bridges so as to create a uniform pattern through out the United States. If their claimed Eleventh Amendment immunity is removed, then Federal jurisdiction cannot be ousted by a particular State statute limiting suits to a particular State court or agency or be inhibited by time limitations, notices or special provisions concerning the presentation of claims, *Raymond International, Inc. v. M/T Dalzelleagle*, supra, *Prendergast v. Long Island Park Commission*, 330 F. Supp. 438 (E.D.N.Y. 1970).

CONCLUSION

The court below erred in ruling that plaintiff was precluded by the Eleventh Amendment from suing defendants in this Court.

The decision of the court below should be reversed and the complaint reinstated.

Respectfully submitted,

McHUGH, HECKMAN, SMITH & LEONARD
*Attorneys for Appellant, Red Star
Towing and Transport Company*

RICHARD E. MEYER
Of Counsel

THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

RED STAR TOWING

VS

CONNECTICUT KANELL

State of New York, County of New York, ss:

AH HAROLD DUDASH, being duly sworn deposes and says that he is
agent for McHugh Heckman, Smith & Leonard, the attorney
for the above named appellant herein. That he is over
21 years of age, is not a party to the action and resides at 2346 Holland avenue BX, NY

That on the 28th day of January, 1977, 19, he served the within appellant's brief and
Joint Appendix

upon the attorneys for the parties and at the addresses as specified below
Pullman, Comley Bradley & Reeves, 855 Main street, Bridgeport, Ct 06604

three copies of the appendix and three of the brief
by depositing
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
tained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,
that being the addresses within the state designated by them for that purpose, or the places
where they then kept offices between which places there then was and now is a regular com-
munication by mail.

28th
Sworn to before me, this
January, 1977
day of, 1976

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

